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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 406

PINKNEY HESTER ICENHOUR, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 66-67) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1950 (R. 67). The petition for a writ of certiorari was filed on November 11, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction of violations of certain internal revenue liquor laws.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code read as follows:

> § 2803 (a) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provision of this section, * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * * [26 U.S.C. 1946 ed. 2803]
>
> § 2810 (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, * * *.
>
> * * * * *
>
> And every person having in his possession or custody, or under his control, any still or

distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. [26 U.S.C. 1946 ed. 2810]

§ 2833 (a). Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * * [26 U.S.C. 1946 ed. 2833]

STATEMENT

An indictment filed in May 1949 (R. 2-4) in the United States District Court for the Southern District of Georgia charged petitioner and three co-defendants, William Frederick Icenhour, Cliatt Morris and George Ray Icenhour,[1] with having in their possession and custody an unregistered still (count 1, 26 U.S.C. 2810), carrying on the business of a distiller without having given bond as

[1] The relationship of the Icenhours is not entirely clear, but there are indications in the record that they are father and sons (R. 24, 52).

required by law (count 2) and with intent to defraud the United States of taxes (count 3, 26 U.S.C. 2833(a)), unlawfully working in a distillery where no sign bearing the words "Registered Distillery" was displayed (count 4, 26 U.S.C. 2831), and unlawfully possessing distilled spirits which did not bear tax-paid stamps (count 5, 26 U.S.C. 2803). Following a trial by jury, petitioner and William Icenhour were found guilty on counts one, two, three and five and not guilty on count four, Morris was found guilty only on count four, and George Icenhour was acquitted on the Government's motion (R. 5, 56). Petitioner was sentenced generally to imprisonment for three years and to pay a fine of $100 (R. 7). On appeal by petitioner alone to the Court of Appeals for the Fifth Circuit, his conviction was affirmed (R. 67).

The evidence in support of petitioner's conviction may be summarized as follows:

On March 31, 1949, at about 3:00 p.m., George J. Finley, an investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, and four state officers (R. 11-12, 23-24, 37, 48-49, 53) were searching for a still when they came upon a road. They followed the road, which ran through defendant Morris' back yard and into the woods, and came within sight of a 75-gallon unregistered still (R. 15, 29-30), located about five hundred yards from Morris' house (R. 11-12, 14, 15, 21, 23-24, 37-38, 48-49, 53). The officers stopped approximately seventy-five

yards from the still site (R. 12, 17, 38, 49) and saw petitioner and his co-defendants working at the still, which was in operation with a fire under it and whiskey running from it into a container (R. 12, 16, 24-25, 26, 27, 31, 35, 36, 38, 49). They saw petitioner near the furnace, defendant Morris changing the containers when they became filled, and defendants William and George Icenhour working around the still (R. 18, 26, 31, 35, 38, 45). The officers watched these activities for about five minutes, and then when they saw Morris coming in their general direction, they ran toward the still. Upon seeing the officers, petitioner and his co-defendants fled into the hills, but petitioner was never out of the sight of the officer who overtook him. The others were also promptly apprehended. (R. 12, 17-18, 26, 27, 31, 32, 38, 49, 53-54.)

At the still the officers found seven gallons of whiskey in an unstamped container, some mash, and a jacket and shoes which William Icenhour, who was arrested in his stocking feet, claimed as his (R. 13, 15, 20, 22, 27, 40, 42, 54).

The officers found petitioner's 1939 Dodge pickup truck within about a hundred yards of the still and in Morris' backyard they found William Icenhour's Chevrolet car (R. 14, 19-20, 24, 27-28, 32, 41). On the road leading from Morris' house to the still yard, which ended at the still and provided the only access to it, they found fresh truck tire and foot prints (R. 15, 24, 33, 40). The officers

testified that since the still was in full operation, there was nothing for the persons attending it to do except change the containers when they became filled with whiskey, and that the raw materials necessary for the operation of the still would normally be transported in a truck (R. 42, 50, 54).

At the close of the Government's case the following occurred (R. 55):

> Mr. Stephens: [counsel for the Icenhours]
>
> I would like to make a motion.
>
> The Court:
>
> I will let the jury go out. I don't have any objections to them hearing it. Do you have a motion you say.
>
> Mr. Stephens:
>
> Yes sir, there is no testimony connecting either one of the defendants with this still and the making of the liquor.

After argument, the judge stated that he was "going to let the case go to the jury" (R. 56). Petitioner did not testify or introduce any other evidence in defense (see R. 56-59).

ARGUMENT

Petitioner's sole contention is that the evidence is insufficient to sustain his conviction;[2] he argues

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[2] At the outset petitioner (Pet. 10-11) contends that the Court of Appeals erred in stating that he did not properly raise this question in the trial court because he "failed to move for an instructed verdict" (R. 67). We agree with

that, especially in view of his acquittal on count four, charging that he worked in an unregistered distillery,[3] the only evidence connecting him with the offenses charged in the remaining counts was that he was present at the still and that he fled when the officers appeared on the scene, and that such evidence is insufficient to warrant a conviction on those counts.

But there was, in addition to the evidence of petitioner's presence and flight, the further evidence that his truck was parked about a hundred yards from the still, that there were fresh truck tire prints on the road leading to it, and that the materials used in the illicit operation would normally be

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petitioner that, although the motion was not labelled as a motion for an instructed verdict, the import of counsel's language was a request for an acquittal (see p. 6, *supra*). The point is not important, however, since the Court of Appeals did not rest its affirmance on the assumed failure to move for an acquittal but upon the ground that the interests of justice did not require a reversal (R. 67). In reaching this conclusion the court obviously reviewed the evidence and found it sufficient to support the conviction.

[3] The jury's finding on this count probably resulted from the inability of the officers to state precisely what work, if any, petitioner was doing during the brief period they had the still under observation (see Pet. 5-9). In any event, any seeming inconsistency in the verdict does not avail petitioner in his attack on the sufficiency of the evidence to support his conviction on the remaining counts. See e.g., *Dunn* v. *United States*, 284 U.S. 390, 393; *Robinson* v. *United States*, 175 F. 2d 4 (C.A. 9), certiorari denied, 338 U.S. 832; *Welch* v. *United States*, 135 F. 2d 465 (C.A. D.C.), certiorari denied, 319 U.S. 769.

transported by truck. This evidence, together with his relationship to two of the other three persons at the still, certainly warranted the inference that he was an active participant in the operation of the still and not a mere bystander. Cf. *Harding* v. *United States*, 182 F. 2d 524 (C.A. 4), certiorari denied, 340 U. S. 874, where evidence of presence near a still located a considerable distance from the defendant's home and flight upon the appearance of officers at the still was held sufficient to sustain a conviction of "operating an illicit distillery".

Even if we assume, *arguendo*, that the evidence is insufficient to sustain petitioner's conviction on count one of having possession and custody of the still and count five charging possession of the illicit whiskey (cf. *Bozza* v. *United States*, 330 U.S. 160, 163-164, cited by petitioner, Pet. 19; see also Pet. 16), he is in no better position. For there is ample evidence showing that, at the least, he assisted in carrying on the business of distilling without having given the required bond and with intent to defraud the United States of taxes, as charged in counts two and three. Whether he had a proprietary interest in the still or was only an aider and abettor of the others is immaterial. 18 U.S.C. 2; *Bozza* v. *United States*, *supra*, at 164-165. Since his general sentence of three years' imprisonment and fine of $100 did not exceed the maximum cumulative sentences which might have been imposed

for the distinct offenses charged in counts two and three (*Neely* v. *United States*, 2 F. 2d 849, 852 (C.A. 4)), any deficiency in the evidence to support his conviction on counts one and five is unavailing. *Pinkerton* v. *United States*, 328 U.S. 640, note, 641-642.

CONCLUSION

Both courts below having upheld the sufficiency of the evidence to support petitioner's conviction, there is no occasion for further review here. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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